Filed 8/21/12 In re A.H. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re A.H., a Person Coming Under the Juvenile Court Law	H037911 (Santa Cruz County Super. Ct. No. DP002066)
SANTA CRUZ COUNTY HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. S.V., Defendant and Appellant.	

Appellant challenges the termination of her parental rights. She argues that the juvenile court should have applied the parent-child beneficial relationship exception to overcome the statutory preference for adoption of an adoptable child. But appellant did not appear at the hearing terminating her parental rights, did not ask the juvenile court to apply this exception, and arguably forfeited her right to have the exception considered on appeal. Although we exercise our discretion to consider the exception on appeal, we conclude that it would not have been an abuse of discretion for the juvenile court to have found there was no "compelling reason" to determine that terminating appellant's parental rights would be detrimental to the child. Therefore, we affirm the order terminating appellant's parental rights.

FACTS AND PROCEDURAL BACKGROUND

Appellant is the mother of A.H. She has another son, who is 11 years older than A.H. Her parental rights to another child had been terminated some time before, apparently because of appellant's inability to conquer drug abuse problems.

On March 6, 2009, when A.H. was a month old, the Department filed a petition to make him a dependent of the juvenile court under Welfare and Institutions Code[1] section 300, subdivisions (b) (failure to protect) and (j) (abuse of child's sibling). The petition alleged that appellant had a history of drug abuse and was using marijuana during her pregnancy and after A.H. was born. She had a medical marijuana card; marijuana use was authorized because of back pain. She also had mental health issues. In addition, A.H.'s father had substance abuse problems and a record of eight arrests for drug-related crimes between 2006 and 2008. Appellant and the father were homeless.

The Department's initial investigation revealed that appellant was caring adequately for A.H. despite the fact that she and A.H.'s father were homeless. A.H.'s brother was under the Department's jurisdiction, but, like A.H., was living with appellant in temporary housing, and appellant was satisfying the requirements of a family maintenance services plan with regard to him.

At a contested jurisdiction/disposition hearing held on April 29, 2009, the juvenile court sustained the dependency petition. The court disagreed with a social worker's written recommendation that appellant keep custody of A.H.—apparently the court was of the view that it might be unsafe for A.H. to be living with appellant—and so it ordered a disposition hearing on that question.

The Department's report for the disposition hearing adhered to the prior recommendation to provide family maintenance services. The report stated that appellant

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[1] All statutory references are to the Welfare and Institutions Code.

was complying with the child-rearing and substance abuse programs in which she was enrolled. A.H. was healthy. But appellant was still testing positive for marijuana, as was A.H.'s father, and appellant admitted that "her marijuana use may be beyond her control." The parents had, however, found housing for themselves and the two boys. At the disposition hearing held on June 5, 2009, the court changed its view about A.H.'s presence in the home and ordered family maintenance services for the parents for six months.

The six-month family maintenance review hearing was held on December 1, 2009. Appellant was still testing positive for marijuana, and a psychological examination showed that she had problems achieving sobriety and finding stable housing and work—although by the time of the six-month hearing the family had found stable housing. The Department recommended continued family maintenance services and the juvenile court agreed. Shortly afterward, the Department filed an interim review report stating that A.H.'s older brother, who had special needs and had been a physical danger to A.H. before, was treating him better now.

The Department's 12-month review report was much the same: the parents were making progress and A.H. was doing well, even though appellant continued to use marijuana—a choice she justified by stating it was less harmful than her prior methamphetamine use. She claimed to have abstained for the past two years from methamphetamine, which, as the social worker quoted her, had been "my primary drug of choice." The father had missed numerous drug tests and in the three he underwent he tested positive for marijuana. Despite these difficulties, the Department recommended continuing family maintenance services and stated that the family's progress was good enough that the case should be considered for dismissal at a hearing to be scheduled two months later.

Before the dismissal hearing could happen, however, the Department filed a supplemental dependency petition under section 387 on October 28, 2010, because of

emergency circumstances. The petition alleged that the father engaged in an argument with appellant and broke windows in the home as he was withdrawing from a self-administered dose of methamphetamine. A.H.'s brother, who was now 13 years old, wielded an ax and, screaming and cursing, threatened to kill appellant. Appellant did not call law enforcement authorities for help—instead, a neighbor did after hearing the commotion. A.H. was found walking barefoot amid remnants of the broken glass. Despite all of this, responding sheriff's deputies did not take the children away, although they arrested the father for trying to fight with a neighbor. But the Department sought to have A.H. removed from the home forthwith, and it changed its prior recommendation to one that would instead have proceedings begin that could lead to appellant's parental rights being terminated and A.H. freed for adoption. The social worker opined that appellant had failed to benefit from years of social services and, because of her continued drug abuse and inability to control the children's father, could not safely rear A.H. After the failure of an initial plan in which the juvenile court and parties agreed to place both boys with A.H.'s day-care provider, with appellant allowed to visit so as to breastfeed A.H., A.H. was placed in foster care. The father became homeless again.

The jurisdiction/disposition hearing on the supplemental petition occurred on January 31, 2011. The juvenile court sustained the petition's allegations but, against the Department's recommendation with regard to appellant, ordered that family reunification services be provided to both parents regarding A.H., including supervised visitation. The court formally warned the parents that further lack of progress could result in their losing their parental rights.

The juvenile court ordered a six-month review hearing on the supplemental petition for July 28, 2011. Again, however, events intervened. On June 13, 2011, the Department filed a modification petition under section 388 to terminate the family's reunification services. It alleged that appellant had effectively abandoned her case plan. Except for attending two counseling sessions, she was not participating in the services

being provided to her. Though maintaining successful visitation with A.H. in March, beginning in April she had missed three visits and was late for another three. She showed up for one visit apparently intoxicated. Both parents were again homeless; appellant stated that she was sleeping in a park and complained that she had no way to ascertain the time of day to be on time for visits. Appellant had been convicted of burglary in April and was on probation for the offense.

At a hearing on July 14, 2011, at which appellant failed to appear despite having notice of it, the juvenile court granted the Department's modification petition. It terminated the parents' reunification services and scheduled a section 366.26 hearing to decide on a permanent plan for A.H.'s future. Meanwhile, it allowed appellant to visit A.H. This she had to do in jail initially, because she had been arrested for fraud. The alleged fraud involved one or more credit and/or automated teller machine cards. On being released, appellant canceled the next scheduled visit, set for August 31, 2011, and no visits occurred in September. According to appellant, between then and December 9, 2011, when the section 366.26 hearing was scheduled, there is no record of whether she visited or did not visit A.H.

The Department's report for the section 366.26 hearing, which was in fact held on December 9, 2011, recommended terminating appellant's parental rights and preparing for A.H.'s adoption. The report explained that A.H. "is an active, affectionate happy 2-year-old boy. . . ." It stated: "The quality of the relationships between [A.H.] and his parents and half brother is not one of a family unit. The minor has not lived with his family since October of 2010. While in [the parents'] care he experienced neglect [and] exposure to his parents' untreated mental health issues, . . . their substance abuse and his brother's mental health issues. [The] parent/child relationship has been disrupted by his placement in foster care and his parents[']absence from his day to day life. . . . [T]he parents' mental health issues, substance abuse, incarcerations, lacking parenting skills,

domestic violence, and their inability to provide adequate/consistent care for the minor have all interfered with the parent/child relationships between the minor and his parents."

A.H. had been placed in an adoptive foster home on August 22, 2011. The Department viewed the placement positively and contended that it would be good for A.H. to be adopted by his foster parents. "[A.H.'s] prospective adoptive parents have expressed a desire to move forward with adopting [A.H.] and a commitment to caring for him permanently." "[T]he prospective adoptive family [is] very loving and [is] developing a close relationship with [A.H.]. They are dedicated to making sure that [A.H.'s] needs are met and addressed and that he is loved and cared for within their family. They are very committed to enriching [A.H.'s] life and integrating him in to their lives and creating a family that is child-centered."

Ordinarily a section 366.26 hearing is contested, with the affected parent or parents appearing and testifying. A.H.'s parents, however, did not show up for the hearing despite having notice of it. Their counsel requested a continuance but the juvenile court denied it and proceeded to terminate parental rights for both appellant and A.H.'s father. The court found the existence of clear and convincing evidence that A.H. was likely to be adopted and anticipated that A.H.'s adoption would be finalized by June 5, 2012.

DISCUSSION

Appellant argues that the parent-child beneficial relationship exception to the statutory preference for adoption applies to her.

The Department observes, accurately, that because appellant failed to appear for the hearing at which the juvenile court terminated her parental rights, the court was never expressly asked to consider the applicability of the parent-child beneficial relationship exception. In the Department's view, appellant has forfeited this claim on appeal. (See *In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222.)

In turn, appellant argues that the juvenile court had to be aware of the possible applicability of the exception and, in making its ruling terminating her parental rights, it implicitly found it inapplicable. She also argues that this court should exercise its discretion to decide her claim on the merits even if arguably she forfeited it on appeal.

In most cases, unless a statutory provision disallows it, "an appellate court may review a forfeited claim—and '[w]hether or not it should do so is entrusted to its discretion.' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.) We will exercise our discretion to consider appellant's claim on the merits. Terminating a parent's rights vis-à-vis her natural-born child is a most serious matter and determining the merits of a claim on appeal after this has occurred is desirable if the law will allow for it.

Accordingly, we turn to the merits of appellant's claim.

With regard to dispositions in juvenile dependency cases, the best interest of the child controls. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) Adoption is the preferred alternative. (§ 366.26, subd. (b), (b)(1), (b)(2), (b)(5).) " 'The permanent plan preferred by the Legislature is adoption. [Citation.]' [Citation.] ' "The Legislature has decreed . . . that guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent plan and secure alternative that can be afforded them." ' " (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.)

As noted, appellant claims that even if she did not bring the matter to the juvenile court's attention, the court erred by not finding the existence of a statutory exception to the adoption preference, specifically the parent-child beneficial relationship exception to adoption defined in section 366.26, subdivision (c)(1)(B)(i).

"Adoption must be selected as the permanent plan for an adoptable child and parental rights terminated unless the court finds 'a compelling reason for determining that termination would be detrimental to the child due to one or more of the following

circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.[’] [¶] . . . [¶] . . . (§ 366.26, subd. (c)(1)(B)(i).) ‘[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence.’ [Citation.]” (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

Review of a juvenile court determination of the applicability of the parental relationship exception under section 366.26 occurs under a hybrid substantial evidence–abuse of discretion standard. (*In re Bailey J.*, *supra*, 189 Cal.App.4th at pp. 1314-1315.) “Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental . . . relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court’s determination. Thus, . . . a challenge to a juvenile court’s finding that there is no beneficial relationship amounts to a contention that the ‘undisputed facts lead to only one conclusion.’ [Citation.] Unless the undisputed facts established the existence of a beneficial parental . . . relationship, a substantial evidence challenge to this component of the juvenile court’s determination cannot succeed. [¶] The same is not true as to the other component of . . . the parental relationship exception . . .[,] . . . [namely] the requirement that the juvenile court find that the existence of that relationship constitutes a ‘*compelling reason* for determining that termination would be detrimental.’ (§ 366.26, subd. (c)(1)(B), italics added.) A juvenile court finding that the relationship is a ‘compelling reason’ for finding detriment to the child is *based* on the facts but is not primarily a factual issue. It is, instead, a ‘quintessentially’ discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.] Because this component of the juvenile court’s decision is discretionary, the abuse of discretion standard of review applies.” (*Ibid.*)

Applying the foregoing standard of review to the record before us, we will affirm the juvenile court's decision to terminate appellant's parental rights. The record in this matter does not establish the existence of a beneficial parental relationship that would provide a compelling reason to overcome the preference for adoption.

As noted in other cases, "[i]f severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*In re Bailey J.*, *supra,* 189 Cal.App.4th at p. 1315.) To qualify for the exception, appellant had to do "more than demonstrate 'frequent and loving contact' [citation], an emotional bond with the child, or that [she] and [her] child find their visits pleasant. [Citation.] Rather, [she] must show that [she] occup[ies] 'a parental role' in the child's life." (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) The parent-child relationship must "promote[ ] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.*, *supra,* at p. 575.)

The juvenile court would not have abused its discretion (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315) if it had been called upon to consider the beneficial relationship exception and found that appellant had not shown a "compelling reason" (§ 366.26, subd. (c)(1)(B)) to qualify for it. In addition, substantial evidence would have supported a court finding that the relationship did not "promote[ ] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Not only does the record fail to show that A.H. would be "greatly harmed" (*In re*

Autumn H., supra, 27 Cal.App.4th at p. 575) by terminating appellant's parental rights, but all of the evidence is that appellant's ties to A.H. were tenuous, problematic, and marked at times by seeming indifference or by the need to attend to her overwhelming personal problems. From all that appears, appellant did not occupy anything approaching a parental role in A.H.'s life. (*In re Andrea R., supra*, 75 Cal.App.4th at p. 1108.)

CONCLUSION

The order is affirmed.

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Márquez, J.

WE CONCUR:

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Elia, Acting P. J.

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Mihara, J.